No. 20,762

In the United States Court of Appeals for the Ninth Circuit

NATIONAL LABOR RELATIONS BOARD, PETITIONER

v.

JOSEPH T. STRONG d/b/a STRONG ROOFING & INSULATING CO., RESPONDENT

On Petition for Enforcement of an Order of the National Labor Relations Board

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BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD

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INDEX

AUTHORITIES CITED

Cases:

Cases—Continued

Statute: Page

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JURISDICTION

This case is before the Court on the petition of the National Labor Relations Board pursuant to Section 10(e) of the National Labor Relations Act, as amended (61 Stat. 136, 73 Stat. 519, 29 U.S.C., Sec. 151, *et seq.*),[1] for enforcement of its order (R. 18-19)[2] against Joseph T. Strong, d/b/a Strong Roofing

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[1] The pertinent statutory provisions are reprinted in Appendix A, *infra,* pp. 22-33.

[2] References designated "R" are to Volume I of the Record as reproduced pursuant to Rule 10 of this Court. References designated "Tr." are to the reporter's transcript of the testi-

& Insulating Co., issued April 22, 1965, and reported at 152 NLRB No. 2. This Court has jurisdiction of the proceeding, the unfair labor practices having occurred in Alhambra, California, where respondent is engaged in the residential and commercial roofing business.[3]

STATEMENT OF THE CASE

I. The Board's Findings of Fact

Briefly, the Board found that respondent violated Section 8(a)(5) and (1) of the Act by refusing to sign and honor a collective bargaining agreement

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mony as reproduced in Volume II of the Record. References designated "GC Exh.," "R. Exh.," or "TX Exh." are to exhibits of the General Counsel, Respondent and Trial Examiner respectively.

[3] Respondent contests the Board's assertion of jurisdiction on the grounds that Strong, as an individual proprietor, annually purchased less than $50,000 worth of supplies originating outside the state of California (Tr. 88). The Board, however, determined that Strong was engaged in a business affecting commerce within the meaning of Sections 2(6) and (7) of the Act because, at all times material herein, he was a member of a multi-employer bargaining association at least one of whose members annually performed more than $50,000 worth of services outside the state of California (R. 12-13; Tr. 6, 7). As the ultimate question to be determined on the merits is also whether Strong was a member of the multi-employer bargaining association, it is apparent that if the Board's determination on the merits is correct, and Strong is a member of the bargaining association, then its assertion of jurisdiction is also correct. See, e.g., *N.L.R.B.* v. *Cascade Employers Association, Inc.*, 296 F. 2d 42 (C.A. 9), remanded on other grounds; *N.L.R.B.* v. *Miscellaneous General Drivers, Local 610*, 293 F. 2d 437 (C.A. 8); *Insulation Contractors of Southern California, Inc.*, 110 NLRB 638.

negotiated on its behalf by a multi-employer association to which respondent belonged and through which it participated in multi-employer bargaining with the Union,[4] and by refusing to continue to recognize and to bargain with the Union as the representative of respondent's employees in a multi-employer bargaining unit. The evidence upon which the Board based these findings may be summarized as follows.

A. *Background: The Roofing Contractors' Association*

The Roofing Contractors Association of Southern California, Inc., hereafter called the Association, was formed for the purpose, *inter alia*, of negotiating labor contracts with the Union (R. 13; Tr. 9, 18; GC Exh. 2). The by-laws of the Association provide for three types of membership, regular, associate contractor, and associate (R. 14; Tr. 24; GC Exh. 2). Regular members are contractors who operate union shops and who, under the by-laws of the Association, are bound by the collective bargaining contract negotiated by the Association (R. 14; Tr. 18, 19, 26-27; GC Exh. 2). Associate contractor members are contractors who operate non-union shops and who are not covered by the Association's collective bargaining agreement (R. 14; Tr. 24-25; GC Exh. 2). Associate members are manufacturers, suppliers, or wholesalers of roofing materials (Tr. 24, GC Exh. 2).

Prior to the start of contract negotiations, the Association mails authorization proxies to its members.

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[4] Roofers Local 36, United Slate, Tile and Composition Roofers, Damp and Waterproof Workers Association, hereafter called the Union.

The proxies are mailed to regular members for their information only. Whether or not regular members sign proxies, they are bound by any agreement reached in the negotiations (R. 17; Tr. 28-29).[5] Throughout negotiations, the Association keeps all of its members informed of their progress by mail (R. 15; Tr. 16-18, 29). Though regular members are automatically bound by the collective bargaining agreement negotiated, it has been the past practice of the Union to have them sign a copy of the contract (R. 14-15; Tr. 36-37, 86, 90-91).

B. *Respondent: its membership in the Association and attempted withdrawal in 1962*

Respondent is an individual proprietor doing business under the trade name of Strong Roofing & Insulating Co., and is engaged in the roofing of residential and commercial buildings (R. 12). Strong joined the Roofing Contractors Association about 1949 and at one time served as its president (R. 13; Tr. 59, 85). He had been for many years a regular member, as defined in the Association's by-laws (R. 13, 14; GC Ex. 3, p. 7).

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[5] The Association's By-laws provide (GC Exh. 2, p. 9):

> "Each and every regular member shall recognize the Association, its counsel, and each of its duly selected labor committees as the member's exclusive bargaining representatives for negotiating, reaching, agreeing to abide by, and/or signing any and all collective bargaining agreements with labor unions . . . . Any such labor contract negotiated by the Committee shall be binding upon the regular members of this Association separately and collectively."

As a regular member of the Association, Strong signed the August 15, 1960, to August 14, 1963, agreement between the Union and the Association (R. 14; Tr. 13, 37). On January 23, 1962, during the contract term, Strong wrote the Union requesting termination of the contract at the earliest possible time (R. 14; Tr. 63, R. Exh. 2). This letter was unanswered; and there is no evidence that it was ever received by the Union or transmitted to the Association (R. 15; Tr. 40-41, 65). Despite the letter, Strong continued to observe the contract, and paid fringe benefits to the Union Roofers Trust Account (R. 14; Tr. 65-66).[6]

C. *Negotiations for a New Contract*

Prior to March 1963 when negotiations for a new contract began, (R. 15; Tr. 16), the Association, pursuant to its usual practice, mailed Strong an authorization proxy which he neither signed nor returned (R. 17; Tr. 62-63). Strong did not remember whether he had signed an authorization prior to the 1960 negotiations, but testified that in the past he had not always signed the proxies (R. 17; Tr. 62). Negotiations between the Union and the Association continued until August 14, 1963, when the terms of a new four-year contract were agreed upon (R. 15; Tr. 16, 35). This contract, ratified by the Union's membership on August 17, 1963, had an effective date of

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[6] The contract term was from August 15, 1960, to August 14, 1963, and from year to year thereafter, unless notice was given 60 days prior to August 14, 1963, or any subsequent yearly period (R. 15; TX Exh. 1).

August 15, 1963 (R. 15; Tr. 16, 35, GC Exh. 4). During the negotiations, the Association informed all regular members, including Strong, of progress and invited them to attend two open negotiating sessions (R. 15; Tr. 16-19, 69). Strong received all of the progress reports and continued to observe the expiring contract during the negotiations (R. 14, 15; Tr. 19, 65-66, 69).

D. *Respondent's Refusal to Sign the Collective Bargaining Agreement*

On August 20, 1963, three days after the Union's membership ratified the agreement, Strong wrote the Joint Labor Relations Board, a grievance board composed of contractor and Union representatives (R. 15; Tr. 21, 22), requesting termination of the contract and the refund of his security deposit,[7] "persuant [sic] to that Artle [sic] in the Master Agreement dated August 15, 1963; to and including August 15, 1967, pertaining to the termination of the Master Contract" (R. 15; Tr. 22, 66, 67, R. Exh. 3).[8] Upon receipt of this letter the Joint Board, without further action, turned it over to the Association's representative (R. 15; Tr. 22-24).

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[7] Strong, as required by the Master Agreement, gave a $400.00 security deposit to the Association to insure payment of wages and fringe benefits. The Association, in turn, bonded Strong for $1,000.00 (R. 15; Tr. 14-15, 22-23; TX. Exh. 1; GC Exh. 4).

[8] The termination clause in the new contract is the same as that contained in the prior agreement described in footnote 6, *supra* (R. 15; GC Exh. 4).

In September 1963, Strong telephoned the Association and asked that his status be changed from that of a regular member to that of an associate contractor member (R. 16; Tr. 14-15). However, Strong paid the higher, regular member dues in October, November, and December (R. 16; Tr. 20; GC Exh. 3) and paid fringe benefits to the Union Roofers Trust Fund in September and October 1963 (R. 15; Tr. 69, 78, 88; GC Exh. 5(a) and (b)), pursuant to his belief that the new agreement required 60-days notice any time during the contract term in order to terminate it (TX 4; Tr. 66-70).

In December 1963, the Association credited Strong's account with $6.75, the difference between the regular and associate membership dues for October, November, and December (R. 16; Tr. 20; GC Exh. 3). In January 1964, Strong's $400.00 deposit was returned by the Association (R. 16; Tr. 23, 70). Prior to the return of his deposit by the Association, Strong had not received an answer to his August 20, 1963, letter to the Joint Board requesting termination of the contract (Tr. 69).

On October 18, 1963, December 10, 1963, and again in April 1964, Union representatives contacted Strong and his wife, who managed the Company office, in an attempt to have the new contract signed. On October 18, Mrs. Strong told Union representative Sheridan that her husband had withdrawn from the Association and therefore would not sign. When Sheridan called the next day, Mrs. Strong told him that she had spoken to her husband who had con-

firmed his intent to withdraw and that he therefore would not sign the agreement. On December 10, 1963, Strong's wife said that they would not sign the contract because they no longer employed any union members. Finally, in April 1964, Strong himself refused to sign the agreement for "economic reasons" (R. 16; Tr. 37, 51-52, 72-73, 84-85, 90-91).

II. The Board's Conclusion and Order

The Board found that respondent violated Section 8(a)(5) and (1) of the Act by refusing on and after April, 1964 to recognize and to bargain with the Union as the representative of respondent's employees in an appropriate multi-employer unit comprised of the employees of the Association's regular members (R. 7).

The Board's order requires respondent to cease and desist from the unfair labor practices found and from in any like or related manner interfering with, restraining, or coercing its employees in the exercise of their statutory rights. Affirmatively, the Board ordered respondent to (a) execute and honor the 1963 to 1967 agreement between the Union and the Association; (b) pay to the appropriate source any fringe benefits provided for in the contract; and (c) post appropriate notices (R. 17-19).

ARGUMENT

I. Substantial Evidence On The Record As A Whole Supports The Board's Finding That Respondent Violated Section 8(a)(5) And (1) Of The Act By Refusing To Sign And Honor The Collective Bargaining Agreement Negotiated On Respondent's Behalf By The Employer Association To Which It Belonged And Which Represented It In Bargaining With The Union

A. *Respondent was a member of the Association in April 1964, when it unlawfully refused to sign the Association-Union Agreement*

Respondent's refusal to sign the collective agreement in April, 1964 for the third time clearly violated the Act. The law is settled that an employer violates the Act by refusing to sign an agreement reached between a union and a multi-employer association of which the employer is a member. *N.L.R.B.* v. *Jeffries Banknote Co.*, 281 F. 2d 893, 896 (C.A. 9); *N.L.R.B.* v. *Sheridan Creations, Inc.*, 357 F. 2d 245 (C.A. 2); *Cook & Jones, Inc.*, 146 NLRB 1664, 1673-1674, enforced 339 F. 2d 580 (C.A. 1). The record in this case makes plain that respondent was a member of the Roofing Contractors Association in April 1964. Respondent had been a member since 1949, Strong had been president of the Association (Tr. 85), and respondent had signed the August 15, 1960, agreement. It continued to abide by that agreement during its term and observed the requirements of the 1963 contract through October 1963. And respondent did not notify the Union, upon receipt of the 1963 proxies and information regarding the 1963 negotiations, that it no longer considered

itself a member. Finally, the withdrawal letter which respondent sent to the Joint Labor Relations Board on August 20, 1963 and respondent's payment of fringe benefits under the 1963 contract further demonstate that respondent had not withdrawn prior to the onset of the March 1963 negotiations. Consequently, the Association was respondent's bargaining representative when the March negotiations began.

Respondent's letter of August 20, 1963, could not terminate respondent's membership in the unit. That letter was written some five months after the Association and the Union had begun to negotiate a new contract. It has been judicially recognized that once negotiations for a new contract begin, an employer may not withdraw from a multi-employer association. *N.L.R.B.* v. *Sheridan Creations, Inc.* 357 F. 2d 245 (C.A. 2); *Universal Insulation Corp.* v. *N.L.R.B.*, No. 16304 (C.A. 6), decided May 20, 1966; *N.L.R.B.* v. *Jeffries Banknote Corp., supra.*[9] The Second Circuit explained the reasons for this rule in the *Sheridan Creations Co.* case as follows (357 F. 2d 247-248):

> "To permit withdrawal after negotiations commence might well lead to a breakdown of the

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[9] Accord, *The Kroger Co.*, 148 NLRB 569; *Retail Associates, Inc.* 120 NLRB 388, 395; *Ice Cream, Frozen Custard Industry Employees, Local 717, Teamsters (Ice Cream Council, Inc.)* 145 NLRB 865, 869-872; *Walker Electric Co.* 142 NLRB 1214, 1220-1221; *Detroit Window Cleaners Union Local 1391 (Daelyte Service Co.)*, 126 NLRB 63; *Spun-Jee Corp.*, 152 NLRB No. 96; *Carmichael Floor Covering Co.*, 155 NLRB No. 65; see also, *International Restaurant Associates*, 133 NLRB 1088, 1089-1091.

> unit. Withdrawal should be restricted to the period before negotiations to assure that it is not used as a bargaining lever. Since this is the purpose of the rule, it is used as an alternative to an inquiry into good faith. . . . A shift in membership after negotiations have begun has lively possibilities for disrupting the bargaining process. In a case such as this, good faith withdrawal of a small unit might in practice have minimal or no effect. However, the potential for disruption is sufficient to justify the Board in adopting a uniform rule for all cases that withdrawal is not timely once bargaining has begun.

This case illustrates the "potential for disruption" to which the Court referred. Responding to the Union's April 1964 request that it sign the contract, respondent justified its refusal on the ground that a "number of the contractors were . . . non-union—that he felt it also hurt his business—and that he would rather go non-union rather than sign it" (Tr. 52). Plainly, multi-employer bargaining could not remain a "vital factor in the effectuation of the national policy of promoting labor peace through strengthened collective bargaining," (*N.L.R.B.* v. *Truck Drivers Local 449*, 353 U.S. 87, 95) if an employer could, for "economic reasons" (Tr. 73), refuse to sign an agreement negotiated on its behalf. Under such circumstances, unions would hesitate to make fruitful concessions in multi-employer bargaining, since those concessions might be taken as the starting point for bargaining between the Union and members of the Association who might withdraw

from the unit in order to obtain better terms by bargaining individually. Furthermore, employers might use threats of withdrawal as a bargaining weapon, thus disrupting the stability of the unit. The Board's rule prohibiting withdrawal once bargaining begins is thus reasonable, and the Board's corollary finding here that respondent violated Section 8(a)(5) and 8(d) of the Act by refusing to sign the agreement is entitled to affirmance.

B. ***The Union did not consent to respondent's withdrawal from the bargaining unit prior to April 1964***

Where the union consents to an employer's wish to withdraw from a multi-employer unit, the employer's withdrawal is effective even if, absent consent, withdrawal would have been untimely. See *Spun-Jee Corp.*, 152 NLRB No. 96, 59 LRRM 1206 (issued May 26, 1965); *Atlas Sheet Metal Works, Inc.*, 148 NLRB 27, 29; *C & M Construction Co.*, 147 NLRB 843, 845. But the Board properly rejected respondent's argument here that the Union consented to its withdrawal by failing to insist that Strong pay fringe benefits required under the new contract. Strong paid those benefits during August, September and October 1963. When respondent first failed to remit benefit payments in November, it had already told union representative Sheridan that it had withdrawn from the Association and would not sign the contract (*supra*, p. 7). Thus, further demand for benefit payments due would have been futile. Consequently, the Board properly refused to construe the Union's

failure to demand such payments as indicating acquiescence in Strong's attempted withdrawal.[10]

Respondent also contends that statements by union representatives when they three times asked respondent to sign the contract evidence consent to respondent's withdrawal from the unit. On October 18, 1963, union representative Sheridan came to respondent's office and asked that the agreement be signed. Told that Mr. Strong had written a letter evidencing his intent not to sign, Sheridan expressed surprise and added "I hate to see you drop out." The next day Sheridan called to ask if respondent was persisting in its refusal, and was told that it was. Thereafter, the Union twice more sought to have Strong sign the agreement, threatening a work stoppage on one of those occasions (Tr. 92), but Strong persisted in his refusal. In light of the Union's repeated attempts to have the contract signed pursuant to its practice with respect to regular members, we submit that the Board properly held that the Union had not consented to respondent's withdrawal from the unit. Compare *Atlas Sheet Metal Works, supra* (union consented to withdrawal by failing to present contract for signature and by bargaining with employer individually).

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[10] That the Association allowed respondent to withdraw and returned his performance bond (R. 5) does not constitute consent by the Union to respondent's withdrawal from the unit, since the record does not show that the Union acquiesced in these actions by the Association.

II. The Board Properly Rejected Respondent's Contention That The Complaint Was Barred By Section 10(b) Of The Act

The complaint in the instant case was based upon a charge filed on June 2, 1964.[11] As shown in the Statement, respondent refused for the third time to sign the contract in April 1964, less than six months before the charge was filed. Consequently, the complaint in this proceeding was not barred by Section 10(b) of the Act which precludes the Board from issuing a complaint based upon a charge alleging a violation of the Act which occurred more than six months before the charge was filed. See *N.L.R.B.* v. *White Construction Co.*, 204 F. 2d 950, 952-953 (C.A. 5).

In its brief to the Board, respondent, relying on *Local 1424, IAM* v. *N.L.R.B. (Bryan Mfg. Co.)*, 362 U.S. 411, argued that Section 10(b) prevented the Board, in assessing the lawfulness of respondent's April 1964 refusal to sign the agreement, from considering events occurring prior to January 2, 1964. Respondent misreads Section 10(b). In *Local 1424*, *supra*, the Supreme Court said (362 U.S. at 416-417):

> [I]n applying rules of evidence as to the admissibility of past events, due regard for the purposes of Section 10(b) requires that two different kinds of situations be distinguished. The first is one where occurrences within the six month limitations period in and of themselves may constitute, as a substantive matter, unfair

[11] GC Exh. 1.

> labor practices. There, earlier events may be utilized to shed light on the true character of matters occurring within the limitations period; and for that purpose Section 10(b) ordinarily does not bar such evidentiary use of anterior events. The second situation is that where conduct occurring within the limitations period can be charged to be an unfair labor practice only through reliance on an earlier unfair labor practice. There the use of earlier unfair labor practices is not merely "evidentiary" since it does not simply lay bare a putative current unfair labor practice. Rather, it serves to cloak with illegality that which was otherwise lawful.

In the instant case, the Board properly treated respondent's continuing membership in the Association, the negotiation of the 1963 contract, and respondent's refusal to sign it in October and December, 1963, as evidentiary matters which "shed light on the true character of matters occurring within the limitations period," *id.*, at 416, and not as unfair labor practices which "cloak with illegality that which was otherwise lawful." *Id.* at 417. Accord, *Local 269, IBEW*, 149 NLRB 768, 773-774, enforced, 357 F. 2d 51 (C.A. 3). Nor was it improper for the Board to consider whether respondent effectively withdrew from the Association in August 1963. The letter of withdrawal was not held to constitute an unfair labor practice. The Board held only that the letter was not a defense to the unfair labor practice charge.[12]

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[12] *N.L.R.B.* v. *Pennwoven, Inc.*, 194 F. 2d 521 (C.A. 3), cited in respondent's brief to the Board, is not in point. There, the court held that Section 10(b) barred a finding that a failure

III. The Board's Order Is Valid And Proper

The Board's Power to Remedy Unfair Labor Practices Includes the Power to Restore the Status Quo

Having found that respondent violated Section 8 (a) (5) of the Act, the Board ordered respondent to sign and honor the contract and to pay to the appropriate source any fringe benefits provided for in the contract. The Board's power to compel an employer to sign and honor a collective agreement which it has unlawfully refused to sign has been recognized by this Court. *N.L.R.B.* v. *Gene Hyde*, 339 F. 2d 568 (C.A. 9). And the requirement that respondent pay fringe benefits simply directs respondent to treat the contract as binding. Since respondent's failure to make those payments "was based [solely] on the refusal to recognize and bargain with the Union, part of the appropriate remedy was to" require respondent "to 'honor' the contract" by paying fringe bene-

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to reinstate three employees which occurred more than six months before they filed charges violated the Act. The court declined to hold that that failure constituted a continuing violation making a subsequent refusal to reinstate the employees within the six month period unlawful. *Cf. American Federation of Grain Millers* v. *N.L.R.B.*, 197 F.2d 451 (C.A. 5). Since there was no independent evidence that the subsequent refusal to reinstate was discriminatory, a finding that Pennwoven violated the Act would necessarily have been based upon a determination that the earlier failure to recall violated the Act, a finding barred by Section 10(b). Here, the Board's order is based upon respondent's April 1964 refusal to sign the contract. The lawfulness of that refusal does not depend upon a finding that any other conduct of respondent violated the Act, but only upon a finding that respondent was a member of the Association in April 1964.

fits due under it. *N.L.R.B.* v. *Gene Hyde, supra,* 339 F. 2d at 572.[13] See *H. J. Heinz Co.* v. *N.L.R.B.*, 311 U.S. 514. Indeed, those payments are essential to restore to respondent's employees a benefit which they would have received but for respondent's unfair labor practice. Thus, the Board's order restores "the situation, as nearly as possible, to that which would have obtained but for the [unfair labor practice]", *Phelps-Dodge Corp.* v. *N.L.R.B.*, 313 U.S. 177, 194. See also *N.L.R.B.* v. *Seven-Up Bottling Co.*, 344 U.S. 344, 352; *N.L.R.B.* v. *Mackay Radio Co.*, 304 U.S. 333, 348; *N.L.R.B.* v. *Gene Hyde, supra,* and "prevents the violator from benefitting by his misdeed." *N.L.R.B.* v. *J. H. Rutter Rex Mfg. Co.*, 245 F. 2d 594 (C.A. 5).[14]

Respondent argued to the Board that it was deprived of due process by the Examiner's imposition of a fringe benefit payment remedy which the General Counsel had not requested. But the Board is free to order a remedy, which the General Counsel has not

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[13] Since respondent does not contest its liability for fringe benefits, given its obligation to honor the contract, no question of contract interpretation is involved. Compare *N.L.R.B.* v. *C. & C. Plywood Corp.*, 351 F. 2d 224 (C.A. 9), cert. granted, 34 U.S. L. Week 3356 (U.S. April 18, 1966) (No. 884).

[14] Respondent's discontinuance of fringe benefit payments rested on its view that it was not bound by the contract because it had no obligation to bargain with the Union. Where an employer discontinues benefits without bargaining with the employees' statutory representative, the Board, with court approval, has ordered the benefits restored. See, e.g., *N.L.R.B.* v. *Central Ill. Public Service Co.*, 324 F. 2d 916, 918-919 (C.A. 7) The situation here is analogous, we submit.

requested. See *N.L.R.B.* v. *Midwest Transfer Company of Ill.*, 287 F. 2d 443, 446 (C.A. 3); *Stewart Die Casting Corp.* v. *N.L.R.B.*, 114 F. 2d 849, 856-857 (C.A. 7). *Cf. N.L.R.B.* v. *Seven-Up Bottling Co. of Miami*, 344 U.S. 344, 348-349. And respondent could and did argue that the proposed remedy was inappropriate in its brief and exceptions to the Board, but it alleged no facts which would have warranted further hearing. Consequently, it was not deprived of an opportunity to challenge the propriety of the order and was not entitled to a hearing. Cf. *Fay* v. *Douds*, 172 F. 2d 720, 722 (C.A. 2); *N.L.R.B.* v. *O. K. Van Storage Co.*, 297 F. 2d 74 (C.A. 5).

Respondent also contended that the Board's order grants the benefit funds a windfall, since respondent's employees were not union members. But that argument assumes that the fringe benefit funds provided for in the contract make payments only to union members, in violation of the National Labor Relations Act. See *N.L.R.B.* v. *Local 815, International Brotherhood of Teamsters*, 290 F. 2d 99 (C.A. 2). There is no warrant for that assumption in the record,[15] and respondent did not offer to prove that fund benefits were payable only to union members.[16]

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[15] The record shows (GC Exh. 4, Art. XI D., p. 18) that payments must be made "for all hours worked by *all* employees of the signatory Contractor covered by this agreement." (Emphasis supplied).

[16] In its answer to the petition for enforcement, respondent contends that the order requiring payment of fringe benefits is unlawful because the fund is unlawful under Section 302 of the Act. This defense was not raised before the Trial Examiner or in respondent's exceptions to the Board. Section

Respondent's further contention that the Union's dilatory tactics led respondent not to pay the fringe benefits and therefore make the Board's order inappropriate, ignores the Union's repeated attempts to have respondent sign the contract, beginning in October just before respondent ceased to pay benefits. Finally, respondent argued that the remedy is inappropriate because it requires respondent to pay fringe benefits accruing more than six months before the charge was filed and before respondent committed the unfair labor practice found. But respondent, had it signed and honored the contract in April 1964, would have been obliged to make payments for the months in which it was delinquent. Hence, the Board's order restores the status quo as it would have existed as of April 1964, and compels respondent to do what it should have done on that date. Section 10(b) is not

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10(e) of the Act provides, in pertinent part, that "no objection that has not been urged before the Board, its member, agent or agency, shall be considered by the Court, unless the failure or neglect to do so shall be excused because of extraordinary circumstances." See, e.g., *Marshall Field & Co.* v. *N.L.R.B.*, 318 U.S. 253; *N.L.R.B.* v. *Giustina Bros. Lumber Co.*, 253 F. 2d 371, 374 (C.A. 9). Consequently, respondent is precluded from urging the illegality of the funds as a ground for reversal

In any event, respondent's objection is without merit. Section 302(c)(2) excludes from the prohibition of Section 302 "any satisfaction of a judgment of any court . . . ." And Section 302(c)(5) excludes payments made to trust funds "for the sole and exclusive benefit of the employees of such employer." Respondent has not shown that the benefits provided for in the agreement fail to qualify for this exception. Absent evidence, we submit, this Court should not presume that a contract provision lawful on its face, is in fact unlawful. *Cf. N.L.R.B.* v. *News Syndicate Co.*, 365 U.S. 695, 699.

a limitation on the Board's remedial power, but on its power to issue a complaint. Section 10(b)'s purpose is to prevent findings of violations of the Act from being based upon "stale" charges. See *Local 1424, IAM* v. *N.L.R.B.*, 362 U.S. 411, 427. That purpose is not offended where the Board takes note of undisputed facts (here the date of the agreement) to determine an appropriate remedy. Accordingly, the remedy is appropriate.

CONCLUSION

For the foregoing reasons, we respectfully request that the Board's order be enforced in full.

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National Labor Relations Board.

June 1966.

CERTIFICATE

The undersigned certifies that he has examined the provisions of Rules 18 and 19 of this Court, and in his opinion the tendered brief conforms to all requirements.

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National Labor Relations Board

APPENDIX A

The relevant provisions of the National Labor Relations Act, as amended (61 Stat. 136, 73 Stat. 519, 29 U.S.C., Secs. 151, *et seq.*) are as follows:

Definitions

Sec. 2 When used in this Act—

* * * *

(6) The term "commerce" means trade, traffic, commerce, transportation, or communication among the several States, or between the District of Columbia or any Territory of the United States and any State or other Territory, or between the District of Columbia or any Territory, or between points in the same State but through any other State or any Territory or the District of Columbia or any foreign country.

(7) The term "affecting commerce" means in commerce, or burdening or obstructing commerce or the free flow of commerce, or having led or tending to lead to a labor dispute burdening or obstructing commerce or the free flow of commerce.

* * * *

Rights of Employees

Sec. 7. Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a

labor organization as a condition of employment as authorized in section 8 (a) (3).

Unfair Labor Practices

Sec. 8 (a) It shall be an unfair labor practice for an employer—

(1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7;

* * * *

(5) to refuse to bargain collectively with the representatives of his employees, subject to the provisions of section 9 (a).

* * * *

Sec. 8 (d) For the purposes of this section, to bargain collectively is the performance of the mutual obligation of the employer and the representative of the employees to meet at reasonable times and confer in good faith with respect to wages, hours, and other terms and conditions of employment, or the negotiation of an agreement, or any question arising thereunder, and the execution of a written contract incorporating any agreement reached if requested by either party, but such obligation does not compel either party to agree to a proposal or require the making of a concession: *Provided*, That where there is in effect a collective-bargaining contract covering employees in an industry affecting commerce, the duty to bargain collectively shall also mean that no party to such contract shall terminate or modify such contract, unless the party desiring such termination or modification—

(1) serves a written notice upon the other party to the contract of the proposed termination

or modification sixty days prior to the expiration date thereof, or in the event such contract contains no expiration date, sixty days prior to the time it is proposed to make such termination or modification;

(2) offers to meet and confer with the other party for the purpose of negotiating a new contract or a contract containing the proposed modifications;

(3) notifies the Federal Mediation and Conciliation Service within thirty days after such notice of the existence of a dispute, and simultaneously therewith notifies any State or Territorial agency established to mediate and conciliate disputes within the State or Territory where the dispute occurred, provided no agreement has been reached by that time; and

(4) continues in full force and effect, without resorting to strike or lock-out, all the terms and conditions of the existing contract for a period of sixty days after such notice is given or until the expiration date of such contract, whichever occurs later.

The duties imposed upon employers, employees, and labor organizations by paragraphs (2), (3), and (4) shall become inapplicable upon an intervening certification of the Board, under which the labor organization or individual, which is a party to the contract, has been superseded as or ceased to be the representative of the employees subject to the provisions of section 9 (a), and the duties so imposed shall not be construed as requiring either party to discuss or agree to any modification of the terms and conditions contained in a contract for a fixed period, if such modification is to become effective before such terms and conditions can be reopened under the provisions of

the contract. Any employee who engages in a strike within the sixty-day period specified in this subsection shall lose his status as an employee of the employer engaged in the particular labor dispute, for the purposes of section 8, 9, and 10 of this Act, as amended, but such loss of status for such employee shall terminate if and when he is reemployed by such employer.

* * * *

REPRESENTATIVES AND ELECTIONS

Sec. 9 (a) Representatives designated or selected for the purposes of collective bargaining by the majority of the employees in a unit appropriate for such purposes, shall be the exclusive representatives of all the employees in such unit for the purposes of collective bargaining in respect to rates of pay, wages, hours of employment, or other conditions of employment: *Provided*, That any individual employee or a group of employees shall have the right at any time to present grievances to their employer and to have such grievances adjusted, without the intervention of the bargaining representative, as long as the adjustment is not inconsistent with the terms of a collective-bargaining contract or agreement then in effect: *Provided further*, That the bargaining representative has been given opportunity to be present at such adjustment.

* * * *

PREVENTION OF UNFAIR LABOR PRACTICES

* * * *

Sec. 10(b) Whenever it is charged that any person has engaged in or is engaging in any such unfair labor practice, the Board, or any agent or agency designated by the Board for such purposes, shall have

power to issue and cause to be served upon such person a complaint stating the charges in that respect, and containing a notice of hearing before the Board or a member thereof, or before a designated agent or agency, at a place therein fixed, not less than five days after the serving of said complaint: *Provided*, That no complaint shall issue based upon any unfair labor practice occurring more than six months prior to the filing of the charge with the Board and the service of a copy thereof upon the person against whom such charge is made, unless the person aggrieved thereby was prevented from filing such charge by reason of service in the armed forces, in which event the six-month period shall be computed from the day of his discharge. Any such complaint may be amended by the member, agent, or agency conducting the hearing or the Board in its discretion at any time prior to the issuance of an order based thereon.

(c) * * * If upon the preponderance of the testimony taken the Board shall be of the opinion that any person named in the complaint has engaged in or is engaging in any such unfair labor practice, then the Board shall state its findings of fact and shall issue and cause to be served on such person an order requiring such person to cease and desist from such unfair labor practice and to take such affirmative action including reinstatement of employees with or without back pay, as will effectuate the policies of this Act: * * *

* * * *

(e) The Board shall have power to petition any court of appeals of the United States, . . . within any circuit . . . wherein the unfair labor practice in question occurred or wherein such person resides or transacts business, for the enforcement of such order and

for appropriate temporary relief or restraining order, and shall file in the court the record in the proceedings, as provided in section 2112 of title 28, United States Code. Upon the filing of such petition, the court shall cause notice thereof to be served upon such person, and thereupon shall have jurisdiction of the proceeding and of the question determined therein, and shall have power to grant such temporary relief or restraining order as it deems just and proper, and to make and enter a decree enforcing, modifying, and enforcing as so modified, or setting aside in whole or in part the order of the Board. No objection that has not been urged before the Board, its member, agent, or agency, shall be considered by the court, unless the failure or neglect to urge such objection shall be excused because of extraordinary circumstances. The findings of the Board with respect to questions of fact if supported by substantial evidence on the record considered as a whole shall be conclusive. If either party shall apply to the court for leave to adduce additional evidence and shall show to the satisfaction of the court that such additional evidence is material and that there were reasonable grounds for the failure to adduce such evidence in the hearing before the Board, its member, agent, or agency, the court may order such additional evidence to be taken before the Board, its member, agent, or agency, and to be made a part of the record . . . . Upon the filing of the record with it, the jurisdiction of the court shall be exclusive and its judgment and decree shall be final, except that the same shall be subject to review by the . . . Supreme Court of the United States upon writ of certiorari or certification as provided in section 1254 of title 28.

* * * *

SUITS BY AND AGAINST LABOR ORGANIZATIONS

SEC. 301. (a) Suits for violation of contracts between an employer and a labor organization representing employees in an industry affecting commerce as defined in this Act, or between any such labor organizatons, may be brought in any district court of the United States having jurisdiction of the parties, without respect to the amount in controversy or without regard to the citizenship of the parties.

(b) Any labor organization which represents employees in an industry affecting commerce as defined in this Act and any employer whose activities affect commerce as defined in this Act shall be bound by the acts of its agents. Any such labor organization may sue or be sued as an entity and in behalf of the employees whom it represents in the courts of the United States. Any money judgment against a labor organization in a district court of the United States shall be enforceable only against the organization as an entity and against its assets, and shall not be enforceable against any individual member or his assets.

(c) For the purposes of actions and proceedings by or against labor organizations in the district courts of the United States, district court shall be deemed to have jurisdiction of a labor organization (1) in the district in which such organization maintains its principal offices, or (2) in any district in which is duly authorized officers or agents are engaged in representing or acting for employee members.

(d) The service of summons, subpena, or other legal process of any court of the United States upon an officer or agent of a labor organization, in his capacity as such, shall constitute service upon the labor organization.

(e) For the purposes of this section, in determining whether any person is acting as an "agent" of another person so as to make such other person responsible for his acts, the question of whether the specific acts performed were actually authorized or subsequently ratified shall not be controlling.

Restrictions on Payments to Employee Representatives

Sec. 302. (a) It shall be unlawful for any employer or association of employers or any person who acts as a labor relations expert, adviser, or consultant to an employer or who acts in the interest of an employer to pay, lend, or deliver, or agree to pay, lend, or deliver, any money or other thing of value—

(1) to any representative of any of his employees who are employed in an industry affecting commerce; or

(2) to any labor organization, or any officer or employee thereof, which represents, seeks to represent, or would admit to membership, any of the employees of such employer who are employed in an industry affecting commerce; or

(3) to any employee or group or committee of employees of such employer employed in an industry affecting commerce in excess of their normal compensation for the purpose of causing such employee or group or committee directly or indirectly to influence any other employees in the exercise of the right to organize and bargain collectively through representatives of their own choosing; or

(4) to any officer or employee of a labor organization engaged in an industry affecting commerce with intent to influence him in respect

to any of his actions, decisions, or duties as a representative of employees or as such officer or employee of such labor organization.

(b) (1) It shall be unlawful for any person to request, demand, receive, or accept, or agree to receive or accept, any payment, loan, or delivery of any money or other thing of value prohibited by subsection (a).

(2) It shall be unlawful for any labor organization, or for any person acting as an officer, agent, representative, or employee of such labor organization, to demand or accept from the operator of any motor vehicle (as defined in part II of the Interstate Commerce Act) employed in the transportation of property in commerce, or the employer of any such operator, any money or other thing of value payable to such organization or to an officer, agent, representative or employee thereof as a fee or charge for the unloading, or the connection with the unloading, of the cargo of such vehicle: *Provided,* That nothing in this paragraph shall be construed to make unlawful any payment by an employer to any of his employees as compensation for their services as employees.

(c) The provisions of this section shall not be applicable (1) in respect to any money or other thing of value payable by an employer to any of his employees whose established duties include acting openly for such employer in matters of labor relations or personnel administration or to any representative of his employees, or to any officer or employee of a labor organization, who is also an employee or former employee of such employer, as compensation for, or by reason of, his service as an employee of such employer; (2) with respect to the payment or delivery of any money or other thing of value in satisfaction of

a judgment of any court or a decision or award of an arbitrator or impartial chairman or in compromise, adjustment, settlement, or release of any claim, complaint, grievance, or dispute in the absence of fraud or duress; (3) with respect to the sale or purchase of an article or commodity at the prevailing market price in the regular course of business; (4) with respect to money deducted from the wages of employees in payment of membership dues in a labor organization: *Provided*, That the employer has received from each employee, on whose account such deductions are made, a written assignment which shall not be irrevocable for a period of more than one year, or beyond the termination date of the applicable collective agreement, whichever occurs sooner; (5) with respect to money or other thing of value paid to a trust fund established by such representative, for the sole and exclusive benefit of the employees of such employer, and their families and dependents (or of such employees, families, and dependents jointly with the employees of other employers making similar payments, and their families and dependents): *Provided*, That (A) such payments are held in trust for the purpose of paying, either from principal or income or both, for the benefit of employees, their families and dependents, for medical or hospital care, pensions on retirement or death of employees, compensation for injuries or illness resulting from occupational activity or insurance to provide any of the foregoing, or unemployment benefits or life insurance, disability and sickness insurance, or accident insurance; (B) the detailed basis on which such payments are to be made is specified in a written agreement with the employer, and employees and employers are equally represented in the administration of such fund, together with such neutral persons as the representatives of the em-

ployers and the representatives of employees may agree upon and in the event the employer and employee groups deadlock on the administration of such fund and there are no neutral persons empowered to break such deadlock, such agreement provides that the two groups shall agree on an impartial umpire to decide such dispute, or in event of their failure to agree within a reasonable length of time, an impartial umpire to decide such dispute shall, on petition of either group, be appointed by the district court of the United States for the district where the trust fund has its principal office, and shall also contain provisions for an annual audit of the trust fund, a statement of the results of which shall be available for inspection by interested persons at the principal office of the trust fund and at such other places as may be designated in such written agreement; and (C) such payments as are intended to be used for the purpose of providing pensions or annuities for employees are made to a separate trust which provides that the funds held therein cannot be used for any purpose other than paying such pensions or annuities; or (6) with respect to money or other thing of value paid by any employer to a trust fund established by such representative for the purpose of pooled vacation, holiday, severance or similar benefits, or defraying costs of apprenticeship or other training program: *Provided*, That the requirements of clause (B) of the proviso to clause (5) of this subsection shall apply to such trust funds.

(d) Any person who willfully violates any of the provisions of this section shall, upon conviction thereof, be guilty of a misdemeanor and be subject to a fine of not more than $10,000 or to imprisonment for not more than one year, or both.

(e) The district courts of the United States and the United States courts of the Territories and possessions shall have jurisdiction, for cause shown, and subject to the provisions of section 17 (relating to notice to opposite party) of the Act entitled "An Act to supplement existing laws against unlawful restraints and monopolies, and for other purposes," approved October 15, 1914, as amended (U.S.C., title 28, sec. 381), to restrain violations of this section, without regard to the provisions of sections 6 and 20 of such Act of October 15, 1914, as amended (U.S.C., title 15, sec. 17, and title 29, sec. 52), and the provisions of the Act entitled "An Act to amend the judicial Code and to define and limit the jurisdiction of courts sitting in equity, and for other purposes," approved March 23, 1932 (U.S.C., title 29, secs. 101-115).

(f) This section shall not apply to any contract in force on the date of enactment of this Act, until the expiration of such contract, or until July 1, 1948, whichever first occurs.

(g) Compliance with the restrictions contained in subsection (c)(5)(B) upon contributions to trust funds, otherwise lawful, shall not be applicable to contributions to such trust funds established by collective agreement prior to January 1, 1946, nor shall subsection (c)(5)(A) be construed as prohibiting contributions to such trust funds if prior to January 1, 1947, such funds contained provisions for pooled vacation benefits.

APPENDIX B

Pursuant to the Rule 18(f) of the Rules of the Court:

GENERAL COUNSEL'S EXHIBITS

No.	Identified	Offered	Received
1(a) - 1(f)	4	4	5
2	11	12	12
3	14	15	15
4	16	16	16
5(a) and 5(b)	38	39	39
6	82	87	—

RESPONDENT'S EXHIBITS

No.	Identified	Offered	Received
1	24-25	24-25	25
2	63	63	65
3	66	66	66

TRIAL EXAMINER'S

No.	Identified	Offered	Received
1	71	71	71

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